

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JULIO CESAR NAVAS,

Plaintiff,

v.

JUDGE JEROME POLAHA, et al.,

Defendants.

Case No. 3:18-CV-0020-RCJ-CBC

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice IB 1-4. For the reason set forth below, it is recommended that plaintiff's complaint be dismissed.

Plaintiff is an inmate in the custody of the Nevada Department of Corrections (ECF No. 1). On October 24, 2018, the undersigned Magistrate Judge issued an order denying plaintiff's application to proceed *in forma pauperis* because the court has on at least three occasions dismissed civil actions commenced by plaintiff for failure to state a claim upon which relief could be granted (ECF No. 8). The court ordered plaintiff to pay the full filing fee within thirty days and cautioned plaintiff that failure to do so would result in a report and recommendation that this case be dismissed. (*Id.*) To date, plaintiff has failed to pay the filing fee as ordered.

Under the Prison Litigation Reform Act, if a prisoner has "on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or an appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted," that person shall be

1 precluded from commencing any new cases *in forma pauperis* except upon a showing of
2 imminent danger of serious physical injury. 28 U.S.C. § 1915(g).

3 On at least three occasions this court dismissed civil actions commenced by
4 plaintiff for failure to state a claim on which relief could be granted. See *Navas v. State*
5 *of Nevada*, Case No. 3:06-CV-0262-RCJ-VPC (dismissed case for failure to state a claim
6 and expressly held that the dismissal would count as plaintiff's "third strike" pursuant to
7 28 U.S.C. § 1915(g)). *Julio Cesar Navas v. Anna Marie Navas, et al.*, CV-N-04-0101-
8 HDM-VPC (dismissal for failure to state a claim); *Julio Navas v. Second Judicial District*
9 *Court*, CV-N-04-0653-HDM-VPC (dismissal for failure to state a claim). In addition, there
10 were no allegations in the complaint or any other filing in the record that plaintiff was in
11 imminent danger or any serious physical injury.

12 District courts have the inherent power to control their dockets and "[i]n the
13 exercise of that power, they may impose sanctions including, where appropriate . . .
14 dismissal" of a case. *Thompson v. Hous. Auth. Of City of Los Angeles*, 782 F.2d 829,
15 831 (9th Cir. 1986). A court may dismiss an action, with prejudice, based on a party's
16 failure to prosecute an action, failure to obey a court order, or failure to comply with local
17 rules. See *Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (dismissal for
18 noncompliance with local rule); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992)
19 (dismissal for failure to comply with an order requiring amendment of complaint); *Carey*
20 *v. King*, 856 F.2d 1439, 1440-41 (9th Cir. 1988) (dismissal for failure to comply with local
21 rule requiring *pro se* plaintiffs to keep court apprised of address); *Malone v. U.S. Postal*
22 *Service*, 833 F.2d 128, 130 (9th Cir. 1987) (dismissal for failure to comply with court order);
23 *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for lack of
24 prosecution and failure to comply with local rules).

25 In determining whether to dismiss an action for lack of prosecution, failure to obey
26 a court order, or failure to comply with local rules, the court must consider several factors:
27 (1) the public's interest in expeditious resolution of litigation; (2) the court's need to
28 manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring

1 disposition of cases on their merits; and (5) the availability of less drastic alternatives.
2 *Thompson*, 782 F.2d 831; *Henderson*, 779 F.2d at 1423-24; *Malone*, 833 F.2d at 130;
3 *Ferdik*, 963 F.2d at 1260-61; *Ghazali*, 46 F.3d at 53.

4 Here, the court finds the first two factors, the public's interest in expeditiously
5 resolving this litigation and the court's interest in managing the docket, weigh in favor of
6 dismissal. The third factor, risk of prejudice to defendants, also weighs in favor of
7 dismissal, since a presumption of injury arises from the occurrence of unreasonable delay
8 in filing a pleading ordered by the court or prosecuting an action. See *Anderson v. Air*
9 *West*, 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor – public policy favoring
10 disposition of cases on their merits – is greatly outweighed by the factors in favor of
11 dismissal discussed herein. Finally, a court's warning that his failure to obey the court's
12 order will result in dismissal satisfies the "consideration of alternatives" requirement.
13 *Ferdik*, 963 F.2d at 1262; *Malone*, 833 F.2d at 132-33; *Henderson*, 779 F.2d 1424. The
14 court's order requiring plaintiff to pay the full filing fee within thirty days expressly stated:
15 "If plaintiff fails to do so, this court will issue a report and recommendation that this case
16 be dismissed due to failure to pay the filing fee." (ECF No. 8 at 2). Thus, plaintiff had
17 adequate warning that dismissal would result from his noncompliance with the court's
18 order to pay the filing fee within thirty days.

19 Based upon the foregoing, the undersigned magistrate judge recommends that
20 this action be dismissed without prejudice for failure to pay the full filing fee in compliance
21 with the court's October 24, 2019 order (ECF No. 8).

22 The parties are advised:

23 1. Pursuant to 28 U.S.C § 636(b)(1)(C) and Rule IB 3-2 of the Local Rules of
24 Practice, the parties may file specific written objections to this report and recommendation
25 within fourteen days of receipt. These objections should be entitled "Objections to
26 Magistrate Judge's Report and Recommendation" and should be accompanied by points
27 and authorities for consideration by the District Court.
28

RECOMMENDATION

DATED: February 5, 2019.

Ganey
STATES MAGISTRATE